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Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

Joshua DeShaney, A Minor by his Guardian ad Litem, and Melody DeShaney,
Petitioners,

v.

Winnebago County Department of Social Services, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

Counsel for both parties have consented to filing of within brief.

ISSUES PRESENTED FOR REVIEW

Whether the due process clause guarantees a right to be free from reckless, willful and wanton, or grossly negligent misconduct of public officials in failing to protect a child from dangerous parents.

INTEREST OF AMICUS CURIAE

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's forty-nine state school boards associations, the Hawaii State Board of Education, the District of Columbia school board and the U.S. Virgin Islands. Established in 1940, NSBA is the only major national educational organization representing 15,300 school boards and their 97,000 members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school

children.

The individuals who compose this nation's school boards are elected (97%) or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational standards of the public schools.

The principle sought by the Petitioners in this case, if established by the Court, could significantly expand liability of local school boards for alleged negligence of school personnel in failing to protect students in their charge from the intentional acts of others. Petitioners seek to establish a federal tort standard which could impose liability on public entities for "negligence" even where general theories of causation under common law principles

of negligence law would not impose liability. Given the perceived "deep pockets" of school districts, plaintiffs would seek damages in federal courts, under 42 U.S.C. section 1983, for injuries to students inflicted by "judgment proof" third parties.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Respondents.

ARGUMENT

I. INTRODUCTION

The Bill of Rights of the U.S. Constitution was adopted to protect the people from abuse of governmental power. The Constitution protects both explicit and implicit rights from governmental abuse. But it does not protect against all damage caused by the government or which could have been prevented by the

government.

However one frames the issue in this lawsuit, its substance is nothing more than an attempt to make a "federal case" out of, at most, an act of negligence by a public employee. Given the lack of causation, what Petitioners seek is a form of "strict liability" which would not be available under any common law negligence theory.

> There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant...
>
> In the case of active misfeasance the victim is positively worse off as a result of the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged, he is merely deprived of a

> protection which, had it been afforded him, would have benefited him.

Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev. 217, reprinted in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy 235 (1951).

There is no legal theory under which Petitioners should be allowed to recover in a federal court. The Constitution's Bill of Rights was not designed to redress all wrongs, even if intentionally committed by the state and "it is not enough to note that [Petitioners] rely on the due process clause of the fourteenth amendment, for that clause is the source of three different kinds of constitutional protection." Daniels v. Williams, 106 S.Ct. 677, 677 (1986) (Stevens, J., concurring).

The first kind of constitutional

protection embodied in the due process clause incorporates the explicit provisions of the Bill of Rights; the second - substantive due process - bars arbitrary government actions directed toward "fundamental rights" which are "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and are peripheral to the express protections in the Bill of Rights, and the third - "procedural due process" - guarantees procedural safeguards for deprivations of "life, liberty or property."

The facts in this case, however unfortunate in the result, do not present a due process violation. If the principle sought in this case were to be established by this Court, federal courts would be opened for lawsuits claiming constitutional violations for "gross

negligence" in failing to protect students from accidents on the playground, school bus accidents, injuries caused by defective athletic equipment and a myriad of other negligence actions which are more appropriately handled in state court under general principles of tort law.

Under the theories profferred by the Petitioners in this case, school boards could be held liable for "educational malpractice" if a student fails to get into college because of low academic skills; for a student's suicide or drug overdose; or for parental child abuse, where indicators of problems are alleged to have been readily observable by school personnel. If such matters are appropriate for judicial review at all, such review is only appropriate in state court under state law where the state determines what, if any, duty is owed to

the plaintiff.

II. NO SUBSTANTIVE DUE PROCESS RIGHT IS IMPLICATED BY THE FACTS OF THIS CASE.

Since plaintiffs do not allege a violation of an explicit right enumerated in the Bill of Rights, their claim must rest on either an implicit substantive right protected by the due process clause or on the right to procedural protections because the state has allegedly "deprived" plaintiffs of a liberty interest.

Traditionally, this Court has been temperate in overturning state policies on the ground that they violate "substantive due process." The Court has refused to find unconstitutional state action in absence of the existence of a explicit constitutional right or a right which is peripheral to the explicit right, called a "penumbral" right. Griswold v. Connecticut, 381 U.S. 479 (1965).

Penumbral rights, such as the freedom of association and the right of privacy, are deemed by the Court to be "fundamental or 'implicit' in the concept of ordered liberty." Palko, 302 U.S. at 325.

In each case where the Court has found a substantive due process violation, the Court has also found an overriding federal interest in protecting a "right" which the state has, through statute, ordinance or policy, trammeled. But in each case, the state has made a conscious choice, incorporated in a statute or a local policy, which in some way restricts that "right." The statutory policy has been intentionally adopted and enforced.

Under the rubric of "substantive due process," the Court has overturned statutes because they interfere with "penumbral" rights protected by the first amendment including the right of privacy

(use of contraceptives), Griswold v. Connecticut, supra; the right to educate one's children in the school of one's choosing, Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right to study a foreign language, Meyer v. Nebraska, 262 U.S. 390 (1923). In all of these cases, the Court had before it a state statute which on its face abridged the free exercise of a "fundamental right." In those cases the Court discusssed "fundamental right" in terms of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer, 262 U.S. at 399.

Where actions to implement a local policy are challenged, this Court has hesitated to find substantive due process implications. In Wood v. Strickland, 420 U.S. 315 (1975), the Eighth Circuit Court

of Appeals found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court vacated the judgment, holding "[i]t is not the role of the federal courts to set aside decisions of school administrators which the cou may view as lacking a basis in wisdom or compassion." Id. at 326.

In 1982, in a per curiam opinion, this Court reversed another attempt by the Eighth Circuit, through the use of substantive due process, to substitute its own policy judgment for that of the school board. Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

In a concurring opinion in Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985), Justice Powell stated that it was unnecessary for the Court to assume

the existence of a substantive due process right to be free from arbitrary dismissal from a medical program.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution... substantive due process rights are created only by the Constitution. The history of substantive due process "counsels caution and restraint." Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)..."Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing Poe v. Ullman, 367 U.S. 497 (1961)."

Id. at 515 - 516

Under what substantive right do the Petitioners seek to be protected here? A right to be free from bodily harm? A right to be protected from dangerous parents? A right to be free from

governmental negligence? Substantive rights are not created out of whole cloth. They must either be expressly stated in the language of the Constitution itself or derive from express language.

There may be a substantive right to be free from bodily harm which is penumbral to express constitutional rights, but none of those rights are implicated here. For example, the eighth amendment protects those in the criminal system from "cruel and unusual punishment" which would include freedom from bodily harm. That amendment does not apply to social welfare agencies. Other prisoners rights would include a freedom from bodily harm component, e.g. the fifth amendment right relating to self incrimination and the sixth amendment right to counsel, but those rights do not apply here.

Even if the child had been abused by

a public employee, it is not clear that such action would constitute a violation of a "fundamental right" to be free from bodily harm. If the action was taken as part of enforcement of disciplinary rules or for some other official reason, it would raise a "liberty" interest protected by procedural due process, but not a substantive due process right. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (relating to excessive corporal punishment).

Assuming that there is a substantive right to be free from bodily harm, that right is not implicated unless the state, qua state, inflicted the harm. In Martinez v. California, 444 U.S. 277 (1980), for example, plaintiffs alleged that the parole board erred in granting parole to one who later killed the plaintiffs' decedent.

This Court held that the death was too remote a consequence of the parole officer's action to constitute "state action."

> Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "State...of life...without due process of law." Although the decision to release [the parolee] from prison was action by the State, the action of [the parolee] five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death [citations omitted.], we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

Id at 284-85.

If the action in Martinez is not

sufficient to give rise to a federal claim, surely the inaction in the instant case is insufficient to raise a claim. But assuming, arguendo, that such right exists, in order to be actionable the right must be intentionally abridged.

It is difficult to conceive of any other substantive right that could have been abridged by the Respondents in this case. Whatever rights the Petitioners may have under state law, substantive due process rights are created only by the Constitution, either expressly or implicitly because the right is "fundmental" to an orderly society. No such right is implicated here.

Petitioners and their amici are apparantly arguing that children have a substantive right to be protected by state and local child welfare agencies. This Court has been reluctant to denominate

public services as "fundamental rights" in absence of explicit constitutional language. For example, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), while agreeing that education "is perhaps the most important function of state and local governments," this Court refused to hold that education is a "fundamental right" guaranteed by the U.S. Constitution.

> We are in complete agreement...that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.

Id. at 30.

Petitioners and their amici make a compelling case for the need for effective child welfare agency oversight over young

children. But the importance of a service does not turn it into a fundamental right merely because the state opts to offer the service.

Similarly, the Court has declined to hold that there is a fundamental right to decent housing, Lindsey v. Normet, 405 U.S. 56 (1972) or welfare benefits, Jefferson v. Hackney, 406 U.S. 535 (1972).

Since substantive rights are created by the Constitution, not by state law, in order to hold here that Petitioners' substantive due process rights were violated, the Court must find there is a "fundamental right" to state protection from dangerous parents. Furthermore, if that right is a federally protected substantive right, it would exist whether or not the state or locality had a statutory mechanism for removing children from their parents. Thus, there would be

a constitutional duty to create and adequately staff a social welfare agency in every community to protect children from their parents. The argument that once a state offers a service, it must not negligently fail to provide the service, is an appropriate argument only with regard to procedural due process. As noted above, "fundamental rights" are created by the Constitution, not the states.

In absence of such a constitutional fundamental right, there can be no violation under the rubric of substantive due process for either negligent or deliberate action in failing to protect a child from his dangerous parents.

Petitioners cite four court of appeals cases in support of their position that the fourteenth amendment creates the child's right to an

affirmative duty of protection. As we shall see, in each of these cases, the courts make simplistic analyses of Supreme Court doctrine, arriving at unsupported conclusions.

The first decision, Doe v. New York City Deptartment of Social Services, 649 F.2d 134 (2d Cir. 1981), held that state officials may be held liable for their "deliberate indifference" in failing to protect a child from her foster parents. The Second Circuit rested its position on this Court's decision in Estelle v. Gamble, 429 U.S. 97 (1976). Estelle involved a prisoner who allegedly was not provided adequate medical attention while in prison. The Court held that the eighth amendment's proscription against cruel and unusual punishment includes the right to medical care for those whom the state is punishing by incarceration. While the

Second Circuit opinion does not purport to support application of the eighth amendment to social service agencies, nor does it point to any other "fundamental right" that was abridged by the state's "deliberate indifference." In absence of such a "right" no constitutional tort exists.

The Doe court erred when it created a constitutional duty from a finding of "deliberate indifference." No duty to refrain from "deliberate indifference" exists without a corresponding right to protection. No such right exists.

In the second case, Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), the court held that a child has a constitutional right to protection from harm inflicted by his parents, where a "special relationship" exists between the state and the child. The case was dismissed because

the defendants were entitled to good faith immunity because the law was not clearly established at the time of the injury. But the Jensen court discusses this Court's holding in Martinez v. California, supra, stating that the Court left open the possibility that a fourteenth amendment right to protection exists under 42 U.S.C. section 1983.

Martinez held that the parole officer, under the circumstances of the case, did not "deprive" the decedent of life. The Court left open the possibility that under other circumstances the parole officer "could...be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." Id. at 285. However, in a footnote the opinion cautions that "[i]t must be remembered that even if a state decision does deprive an individual of

life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process." Id. at 284 n.9. It should also be noted that Martinez was not a substantive due process case. It involved the issue of whether the statutory grant of immunity to parole officers resulted in a deprivation of life without procedural due process.

In the third lower court case on which the Petitioners rely, Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985), the majority opinion also cites the Martinez dictum in support of its judgment for the plaintiffs. The decision, in a footnote, cites Ingraham v. Wright, supra, for the proposition that "[t]here is a liberty interest in being free from physical assault that can be

fairly attributed to the action of a state." Id. at 509 n.7. Ingraham, of course, involved intentional conduct (imposition of corporal punishment to a student) by public employees and the Court acknowledged a "liberty interest" for purposes of procedural due process. The Court expressly refused to decide the question of whether excessive corporal punishment implicates substantive due process.

The dissent in Estate of Bailey by Oare correctly notes that:

> [S]ection 1983 does not create a federal cause of action for every wrong committed by government employees, no matter how unpleasant the consequences, and notwithstanding that the facts might give rise to a state tort law claim.

Id. at 512.

> There is a danger that by extending [Section 1983] to contexts far removed from Congress' original and

> overarching purposes, a national state tort claims act administered in the federal courts in effect will be created. Steps in that direction should not be lightly taken since the ultimate outcome of such a course might well be incongruent with our role as federal judges.

Id. at 513.

Petitioners seek to impress upon this Court the great public importance of welfare agencies performing their function to protect children from dangerous parents. No caring person could possibly dispute that argument. But the Constitution does not protect against all wrongs. As this Court stated with regard to education, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33 (1973):

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether

> education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

In Rodriguez the Court also noted that education decisions present "a myriad of 'intractable economic, social, and even philosophical problems'" that are best left within the expertise of state and local officials, not the courts. Id. at 42. That caveat would seem to apply equally to decisions of other governmental agencies, such as the one in this case.

Finally, Petitioners cite Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), as supporting the notion that there is a federal right which is violated by "gross

neglect" or "deliberate indifference" of child protection agencies. Taylor was a case involving a child who was placed by the state in the custody of foster parents who abused the child. The circuit court in Taylor cited Youngberg v. Romeo, 457 U.S. 307 (1982) in support of its position that fundamental rights were implicated by the state's action in placing the child in unsafe hands. Petitioners reliance on Taylor is misplaced. This Court ruled in Youngberg that the eighth amendment protection against "deliberate indifference" does not apply in a civil setting.

There is a tremendous analytical leap between Youngberg and the instant case. The plaintiff in Youngberg, a mentally retarded adult, was involuntarily committed to a state institution. Citing Ingraham v. Wright (a procedural due

process case), this Court noted that the "right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." Youngberg, 457 U.S. at 315. The Court agreed with the court of appeals that the trial court erred in instructing the jury that the eighth amendment applies but vacated the appeals court on the standard to be applied. The Court instead adopted the standard of Chief Judge Seitz, the author of a concurring opinion in Youngberg. Judge Seitz opined that the standard for determining malpractice does not apply but, instead, the jury "should decide only whether the defendants' conduct had some basis in accepted professional opinion." Romeo v. Youngberg, 544 F.2d 147, 178 (3d Cir. 1980).

Since the Supreme Court holds that

the substantive right must be balanced against the state's "considerable discretion in determining the nature and scope of its responsibilities," Youngberg, 457 U.S. at 317, it is unclear why a state negligence lawsuit would not be sufficient to protect the constitutional interests of the incarcerated individual. Arguably, Youngberg announced a civil version of the eighth amendment, creating a substantive liberty interest in freedom from cruel and unusual punishment when subjected to involuntary civil commitment. Although the Court refused to find the eighth amendment applicable to civil commitments, clearly the Court was eager to find a way of equating the constitutional duties of the state vis a vis incarcerated criminals, with those of the state vis a vis civil commitees. "If it is cruel and unusual punishment to hold convicted

criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed-who may not be punished at all-in unsafe conditions." Youngberg, 457 U.S. at 315.

It should also be noted that the State in its brief in Youngberg conceded a duty to provide adequate food, shelter, clothing, and medical care, id. at 324, requiring the Supreme Court to take that concession only one step further to include "reasonable safety."

Amicus American Civil Liberties Union is incorrect in its statement that the "Court has never held that formal state custody is a necessary predicate to establish the constitutional right to personal security under the Fourteenth Amendment." Amicus Curiae brief of A.C.L.U. at page 11. Ingraham v. Wright, supra, cited by A.C.L.U. in support of

that statement, did not decide the question of whether gross negligence raises substantive due process claims. The other cases dealing with the question of bodily security are criminal cases or cases involved civil commitment.

Amicus, A.C.L.U. is also incorrect in their assessment that the rulings in Youngberg and Estelle, supra, were based on a premise that "the injured plaintiff [in each case] had relied completely on the state for his or her protection." Amicus curiae brief of A.C.L.U. at page 28. In each case the plaintiffs were incarcerated. "When a person is institutionalized-and wholly dependent on the State-it is conceded by [the State] that a duty to provide certain services and care does exist (emphasis supplied)...." Youngberg, 457 U.S. at 317.

The state's action in taking an individual's freedom and thus depriving him of the protection of his parents is very different from state inaction in failing to provide a service, in absence of incarceration. In the instant case there has been no commitment and federal courts should look to state tort remedies to determine if procedural protections are adequate, rather than creating a new substantive constitutional right.

"A state is under no constitutional duty to provide substantive services for those within its border." Youngberg, 457 U.S. at 319. Amicus submits that there is no constitutional right to protection outside the context of involuntary civil or criminal incarceration. Whether the public officials were guilty of simple or gross negligence or whether the negligence was active or passive, Petitioners were

not deprived of a substantive constitutional right.

III. THE DUE PROCESS CLAUSE PROTECTION OF "LIBERTY INTERESTS" EXTENDS ONLY TO PROCEDURAL CONCERNS.

Although Petitioners cannot show a substantive due process right which could arguably be said to be abridged in this case, it should be determined whether there is a liberty interest meriting protection for purposes of procedural due process. And, if so, whether the state "deprives" a person of the interest, under 42 U.S.C. Section 1983, by action which is not intentional.

A number of "liberty" interests which are protected by the procedural guarantees of the fourteenth amendment, even though they may not be recognized as "fundamental rights." "These interests attain this constitutional status by virtue of the fact that they have been initially

recognized and protected by state law...." Paul v. Davis, 424 U.S. 707, 711 (1976).

By establishing a social services agency with a mission of protecting children, the state does not necessarily confer a constitutional right to the service. If that were true, every public agency, including school districts, police and fire departments and hospitals would be subject to a duty to provide services to all; a loss which could fairly be attributed to the state's failure to provide the service, would be actionable under the due process clause.

The state must do more than merely offer a service before a service recipient can claim a right to the service. In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that a state statute could give rise to a property or liberty interest that merited procedural

due processs protection, but in order for such an entitlement to be present, the Court said it was not enough for one to have an abstract need or desire for a benefit, but instead one must have a "legitimate claim of entitlement" to the benefit. In subsequent cases, this Court has framed the entitlement issue in terms of whether the statute places any "real limits on decisionmaker discretion." Board of Pardons v. Allen, 107 S.Ct. 2415, 2423 (1987) (O'Connor, J. dissenting) See also Olim v. Wakenekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1988). While it is true that the Wisconsin child protection law mandates that the county social services agency take certain steps when it receives notification of suspected child abuse, it also leaves many of the ultimate determinations to the agency's discretion

without the constraint of "particularized standards or criteria."

Even assuming there is a statutory entitlement giving rise to a constitutionally protected liberty or property interest, the state cannot negligently deprive one of that interest, regardless of whether the negligence is simple or "willfull and wanton."

This Court has held that the state does not deprive a person of "life, liberty or property" by negligently causing the loss. In Daniels v. Williams, 106 S.Ct. 662 (1986), the Court held that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." Id. at 663. In that case a prisoner was injured in a fall over a pillow left on the stairs.

In a companion case to Daniels, Davidson v. Cannon, 106 S.Ct. 668 (1986), the Court refused to hold that prison officials abridged a prisoner's constitutional rights, by negligently failing to protect him from an assault by a fellow prisoner. The Court ruled that no procedural due process claim was presented even though the state granted immunity to prison officials for negligent acts. The Court cited the opinion of two of the judges who voted with the majority in the lower court decision which ruled against the prisoner. "[E]ven if respondents' negligence had 'deprived' petitioner of liberty, the State's decision not to provide a remedy, in view of its strong interest in protecting its prison officials from liability, did not violate due process." Id. at 670.

In the instant case, the court below

"assume[s] without having to decide" that the conduct of Respondents was "sufficiently aggravated form of negligence to escape the bar of Daniels v. Williams." DeShaney v. Winnebago County Dep't of Social Services, 812 F.2d 298, 302 (7th Cir. 1987). This assumption stems from a footnote in Daniels that the opinion does not reach the question of whether due process is implicated by conduct which is more egregious than simple negligence.

Although it might be appropriate to apply a different rule to aggravated negligence involving prisoners, there does not seem to be a reason to alter the Daniels rule in a case such as that at bar. This Court has recognized that aggravated negligence constituting "deliberate indifference" to the medical needs of those incarcerated by the state,

constitutes an eighth amendment violation. Similarly, it would seem, aggravated negligence or "deliberate indifference" to an assault by another prisoner could be sufficient to lead the Court to rule that eighth amendment rights are violated.

But the eighth amendment applies only in the criminal context. Ingraham v. Wright, supra. It does not apply in cases such as the instant case. Even in absence of the eighth amendment, there might be cause to rationalize extension of due process coverage for willful and wanton conduct because of the closed environment of the criminal justice system. It could even be argued that the requisite intent under the due process clause is satisified by the action in placing the prisoner in that closed environment, where he could be injured by others.

Such rationale would not be

appropriate, however, for expanding coverage of the due process clause to grossly negligent actions of public officials in contexts other than the criminal justice system. In the schools, for example, this Court has noted that, unlike state prisoners, injured parties in civil contexts have the power to resort to state remedies.

> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Ingraham, 430 U.S. at 670.

Prisoners are not in the position to file criminal assault charges or to seek the assistance of others, because the complaints would have to be filed with the very officials who have committed the offense. In those cases there is no reasonable way to obtain due process from

the state, and therefore, the injured party must resort to the federal courts.

Although it is true that some forms of "negligence" may be so aggravated as to come close to intentional conduct, nevertheless the element of intent is still missirg. As expressed by Justice Holmes, "even a dog knows the difference between being kicked and being tripped over."

A state court would not find proximate cause in the facts of this case. But, even assuming there was a breach of some kind of moral duty, that would be insufficient. In order to justify recovery of damages, there must be a breach of a constitutional right. The fact that the state could arguably have prevented bodily injury to the Petitioner is not sufficient to raise a constitutional duty to act.

Moreover, even were this Court to decide that the state's failure to act constituted a "deprivation" of a liberty interest, procedural due process is satisfied by post-deprivation remedies afforded by state tort laws.

In Wisconsin, the doctrine of sovereign immunity protecting public officials or employees from suit was judicially abrogated in 1962. Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962). This opinion plainly noted that state legislators could reinstate the doctrine if they so decided, but Wisconsin lawmakers chose instead to enact a governmental tort claims statute which draws much of its content from the Holytz opinion, although it does not expressly waive immunity. Wis. Stat. Ann. § 893.80 (1983). Most other states have statutorily waived the immunity of local

government entities, such as school districts, from suit for the negligent acts of public employees. See Appendix. States that have enacted general tort immunity waivers often except certain acts such as execution of statutes, regulations, ordinances with due care or carrying out of discretionary functions. E.g., Alaska Stat. § 9.05.250 (1985); Haw. Rev. Stat. § 662-2, 662-15 (1978); Idaho Code §§ 6-904(1)-(8), 6-918 (1981 & Supp. 1987); Mass. Gen. Laws Ann. ch. 258, § 10 (Supp. 1988); N.D. Cent. Code § 32-12.1-03(3) (1981). Other states have limited waivers that subject school districts to suit for negligence in specific instances, for example, operation of motor vehicles or construction and maintencance of public buildinges. Some states that do not waive tort immunity, generally do allow suits against

governmental entities for gross negligence. E.g. Del. Code Ann. tit. 10, § 4001(3) (1987); D.C. Code Ann. § 6-1012 (1981).

In the event that a case arises where the state does not permit a cause of action for public officials' negligence, even though willfull and wanton, the Court can assess whether the reasons for not providing a remedy are rational for purposes of procedural due process.

CONCLUSION

The failure of the state officials in this case, however egregious it may seem in retrospect, is not unconstitutional. Understandably, Petitioners want to make a "federal case" out of their loss, but the Constitution does not provide a remedy for all losses, however serious they may be.

The seriousness of the injury does not determine whether the Constitution is

implicated. This determination turns on whether the state's action violated a substantive or procedural right protected by the Constitution.

There is no substantive due process violation here because no fundamental right is implicated, and no policy or statute is involved which could be termed "irrational," "arbitrary" or "capricious." As shown above, there is no explicit right in the Bill of Rights from which a fundamental right to protection can be extracted. And, there is no policy or statute which gave rise to the injury.

Similarly, there was no procedural due process violation for two reasons. First, because there is no "liberty interest" created either by state law or by the Constitution itself which would require adoption of procedures to protect from its deprivation. Second, even

assuming a "liberty interest" in freedom from injury caused by grossly negligent actions of the state, the state has provided procedural remedies for such injuries through its tort laws.

It requires no gift of prophecy to anticipate that, if the decision below is reversed, litigants will frame their complaints with sufficiently florid allegations to survive a motion to dismiss, thus, inviting into federal court disputes that should have remained in the state court system.

It simply cannot be said that by offering a service, the state opens itself up to a federal lawsuit when it fails to live up to the expectations of the citizenry as to how that service should be provided. Some might say that the state should provide a remedy to the petitioners in this case, even in absence of proof of

actual negligence. Others might favor some form of strict liability where the state fails to protect children from their parents. Still others might view the presumption in state law favoring parental custody over children as too strong.

But, these complex policy considerations should not and cannot be resolved in the federal courts any more than a myriad of other issues raised by the offering of governmental services, such as education, health, police and fire protection. Federal courts protect against deliberate abuse of power, not ineptitude.

Respectfully submitted,

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APPENDIX

STATUTORY WAIVER OF SCHOOL DISTRICT'S TORT IMMUNITY

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
AL		
AK	X	X
AZ		X(17,18)
AR	X(1)	X(1)
CA	X	X
CO	X(2,5,7)	X(2,5,7)
CT	X	X
DE		X
DC		X
FL	X	X
GA		
HI	X	X
ID	X	X
IL	X	X
IN		X(4)
IA	X	X
KA	X	X
KY	X(9,13)	X(9,13)
LA	X	X
ME	X(5,6,7)	X(5,6,7)
MD	X(2,13)	X
MA	X	X
MI	X(5,7)	X(5,7)
MB	X	X
MS	X(10/1/88)	X(10/1/88)
MO	X(5,6,7)	X(5,6,7)
MT	X	X
NE	X	X
NV	X	X
NH	X(5,7)	X(5,7)
NJ	X(7,9)	X(7,9)
NM	X(5,6,7)	X(5,6,7)
NY	X(5)	X(5)

STATE	IMMUNITY WAIVED FOR SIMPLE NEGLIGENCE	IMMUNITY WAIVER FOR GROSS NEGLIGENCE
NC	X(2)	X
ND	X	X
OH	X(5,8)	X(5,8)
OK	X	X
OR	X	X
PA	X(5,7,19)	X(5,7,19)
RI	X	X
SC	X	X
SD		
TN	X(5,7,9)	X(5,7,9,10)
TX	X(5,11)	X(4,5,11,12)
UT	X(5,7,9,15,16)	X(5,7,9,15,16)
VT	X(2)	X(2)
VA	X(13)	X(13)
WA	X	X
WV	X(5,7,9)	X(5,7,9)
WI	X	X
WY	X(5,7)	X(5,7)

FOOTNOTES

1 only for school bus drivers and operators

2 only to the extent of insurance

3 only in execution or enforcement of laws

4 only in administering medication to students

5 only for operation of motor vehicle

6 only for machinery, furnishings

7 only for construction, operation and/or maintenance of public buildings or other property, thoroughfares

8 only for proprietary functions

9 only for negligence of employees

10 only for gross negligence of board members

11 only when bodily injury caused to student

12 only for gross negligence when disciplining students

13 only as to state liability, not local governmental entities

14 only when rendering emergency first aid

15 only as to contractual obligations

16 only as to property actions

17 only as to issuance or failure to revoke any permit, license, certificate, approval etc.

18 only as to failure to discover violations of inspection laws applicable to property other than property owned by the public entity

19 only as to trees, traffic controls, street lighting, utility services, animals

STATUTORY CITATIONS

Alaska Stat. § 9.05.250 (1985)

Ariz. Rev. Stat. Ann. § 12-820.01 (Supp. 1987)

Ark. Stat. § 80-1811 (1975) (school district not liable, just driver or operator of a school bus)

Cal. Govt. Code § 945 (1978)

Colo. Rev. Stat. §§ 24-10-104, -106 (1984)

Conn. Gen. Stat. §§ 10-212a, 52-557b(b) (1985)

Del. Code Ann. tit. 10, § 4001(3) (1987)

D.C. Code Ann. § 6-1012 (1981)

Fla. Stat. Ann. § 768.28(1), (5) (1977)

Haw. Rev. Stat. § 662-2 (1978)

Idaho Code § 6-903(a) (1981 & Supp. 1987)

Ill. Rev. Stat. Ch. 122 §§ 821-31 (1962 & Supp. 1988) (sovereign immunity of school districts waived by Molitor v. Kaneland Community Dist. No. 302, 18

Ill.2d 11, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968 (1960)

Ind. Code Ann. § 34-4-16.5-3.5 (1986 & Supp. 1987)

Iowa Code §§ 613A.2, 613A.4 (1985)

Kan. Stat. Ann. § 75-6101 (1983 & Supp. 1987)

Ky. Rev. Stat. Ann. § 44.072(Supp. 1986)

La. Const. art. 12, § 10(A) (1977)

Me. Rev. Stat. Ann. tit. 14, § 8104 (1984)

Md. State Govt. Code Ann. §§ 12-103, -104 (1984 & Supp. 1987)

Mass. Gen. Laws Ann. ch. 258 § 2 (Supp. 1988)

Mich. Comp. Laws §§ 691.1405, .1406 (1982 & Supp. 1987)

Minn. Stat. Ann. § 466.02 (1984)

Miss. Code Ann. § 11-46-5(1) (Supp. 1987)

Mo. Rev. Stat. § 537.600 (1987)

Mont. Code Ann. § 2-9-102 (1983)

Neb. Rev. Stat. § 23-2407(1985)

Nev. Rev. Stat. § 41.031 (1987)

N.H. Rev. Stat. Ann. § 507-B:2 (1983)

N.J. Stat. Ann. §§ 59:2-2, 59:3-1, 59-4-2 (1983)

N.M. Stat. Ann. § 41-4-4 to -4-6 (1978)

N.Y. Gen. Mun. Code § 50-6 (1986)

N.C. Gen. Stat. § 115C-42 (1987)

N.D. Cent. Code § 32-12.1-03(1) (1981)

Ohio Rev. Code Ann. § 2744.02(A), (B)(1), (2) (1988)

Okla. Stat. Ann. tit. 51, §§ 153, 155 (1984)

Or. Rev. Stat. § 30.265 (1987)

Pa. Stat. Ann. tit. 42, § 8542 (1982)

R.I. Gen. Laws § 9-31-1 (Supp. 1983)

S.C. Code Ann. §§ 15-78-20 to -60 (Supp. 1987)

Tenn. Code Ann. §§ 29-20-201 to - 205 (1980)

Tex. Educ. Code Ann. §§ 21.912(b) .914 (1987); Tex. Civ. Prac. & Rem. Code §

101.021, .051 (1986)

Utah Code Ann. §§ 63-30-5 to - 10 (1986)

Vt. Stat. Ann. tit. 29, § 1403 (1986)

Va. Code Ann. § 8.01-195.3 (1984 & Supp. 1988)

Wash. Rev. Code Ann. § 4.96.010 (Supp. 1988)

W. Va. Code § 29-12A-4 (1986)

Wis. Stat. Ann. § 893.80 (1983) (Legislative Council Report notes judicial waiver of immunity from which statute draws some of its content)

Wyo. Stat. §§ 1-39-105, -106 (1987)